No. 14-8913

IN THE SUPREME COURT OF THE UNITED STATES

SAUL MOLINA-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court committed reversible plain error when it sentenced petitioner within an erroneous Sentencing Guidelines range, but petitioner's sentence also fell within the correct range and petitioner identified nothing in the record to establish a reasonable probability that the error affected his sentence.

IN THE SUPREME COURT OF THE UNITED STATES

No. 14-8913

SAUL MOLINA-MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 20-21) is not published in the Federal Reporter but is reprinted in 588 Fed. Appx. 333.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2014. Pet. App. 20. The petition for a writ of certiorari was filed on March 16, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted of being unlawfully present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). He was sentenced to 77 months of imprisonment. The court of appeals affirmed. Pet. App. 20-21.

1. On August 31, 2012, United States Customs and Border Protection agents located petitioner near Sarita, Texas, as he was attempting to circumvent a border checkpoint. Presentence Investigation Report (PSR) ¶ 4. Petitioner, who is a citizen of Mexico with no legal status in the United States, admitted that he had illegally entered the United States by crossing the Rio Grande River near Hidalgo, Texas, several days earlier. PSR ¶¶ 4-5. A records check revealed that petitioner had been convicted of aggravated burglary in Tennessee in 2002 and 2011 and previously had been deported from the United States to Mexico in 2007 and 2012. PSR ¶ 5.

2. Based on the foregoing, a grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of being found unlawfully present in the United States after having been deported following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a) and (b). PSR ¶¶ 1-2.

Petitioner pleaded guilty to that offense without a plea agreement. Pet. App. 20; PSR ¶ 3.

a. The Probation Office prepared a PSR that calculated petitioner's base offense level as eight under Sentencing Guidelines § 2L1.2(a) (2012). PSR ¶ 13. The Probation Office recommended a 16-level increase in petitioner's offense level under Section 2L1.2(b)(1)(A)(ii) because petitioner previously had been deported after convictions for aggravated burglary, a felony crime of violence. PSR ¶ 14. With a three-level reduction in offense level for acceptance of responsibility, the Probation Office calculated petitioner's total offense level as 21. PSR ¶¶ 19, 22.

The Probation Office determined that petitioner had 18 criminal history points, which placed him in criminal history category VI. PSR ¶ 35. Four criminal history points were assessed under Sentencing Guidelines § 4A1.1(a) and (e) for two Tennessee aggravated burglary convictions, for which petitioner was sentenced to three years in prison on May 24, 2002. PSR ¶¶ 25-26. One criminal history point was assessed under Section 4A1.1(c) for a federal conviction for entering the United States illegally, for which petitioner was sentenced to time served (approximately two days) on January 19, 2007. PSR ¶ 27. The Probation Office assessed 11 criminal history points under Section 4A1.1 (a) and (e) for five aggravated burglary convictions stemming from burglaries that petitioner committed in May 2009 and May 2010, for which

petitioner was sentenced to eight years in prison on April 7, 2011. PSR ¶¶ 28-32. An additional two points were assessed under Section 4A1.1(d) because, at the time of the instant offense, petitioner was still on parole for the sentences in his 2009 and 2010 burglary cases. PSR ¶ 34.

A total offense level of 21 and a criminal history category of VI resulted in an advisory Sentencing Guidelines range of 77 to 96 months of imprisonment. PSR ¶ 74. The Probation Office also noted that petitioner was subject to a statutory maximum term of 20 years of imprisonment under 8 U.S.C. 1326(a) and (b). PSR ¶ 73.

b. Petitioner objected to the PSR's proposed 16-level enhancement based on his prior aggravated burglary convictions, arguing that the Tennessee convictions did not qualify as crimes of violence under the relevant Sentencing Guidelines definition. C.A. Record on Appeal (ROA) 25, 107-111. Petitioner did not object, however, to the PSR's calculation of his criminal history category. Ibid.

At the sentencing hearing, the district court overruled petitioner's objection to the 16-level enhancement and adopted the PSR's calculation of an advisory range of 77 to 96 months. C.A. ROA 111, 115. The government urged the court to impose "a high end sentence of 96 months" in order "to protect the public from" petitioner, emphasizing that petitioner's multiple burglary convictions had involved "breaking into people's homes," including

while armed. Id. at 111-112. Petitioner responded that he had not used violence during the burglaries and asked the court to impose the 77-month term recommended by the Probation Office. Id. at 113-114. The court sentenced petitioner to 77 months of imprisonment, to be followed by three years of supervised release. Id. at 115.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 20-21. Petitioner argued for the first time on appeal that the district court had erred in calculating his criminal history category. Id. at 20. The court of appeals determined that, because petitioner did not raise that argument before the district court, it was reviewable only for plain error. Ibid. To show plain error, the court explained, petitioner was required to show an "error that is clear or obvious and that affects his substantial rights," and if he made such a showing, the court had "the discretion to correct the error if it seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." Ibid.

The court of appeals first concluded that the district court had made "a plain or obvious error" in calculating petitioner's criminal history when it assessed 11 criminal history points for the five Tennessee aggravated burglary convictions for which petitioner was sentenced on April 7, 2011. Pet. App. 20-21. The court explained that, under the Sentencing Guidelines, prior sentences are counted as a single sentence if they were imposed on

the same day, unless the offenses were separated by an intervening arrest. Id. at 20 (citing Sentencing Guidelines § 4A1.2(a)(2)). Because no arrest intervened between any of the five burglaries, the court concluded that petitioner should have received only five points for the five burglaries, resulting in a total of 12 criminal history points and a criminal history category of V. Id. at 20-21. The correct calculation would have reduced petitioner's advisory Guidelines range from 77 to 96 months to 70 to 87 months. Id. at 21. The government conceded the error. Ibid.

The court of appeals concluded, however, that petitioner had not established that the error affected his substantial rights because he had not shown "a reasonable probability that, but for the district court's misapplication of the Guidelines, he would have received a lesser sentence." Pet. App. 21 (quoting United States v. Garcia-Carrillo, 749 F.3d 376, 379 (5th Cir.), cert. denied, 135 S. Ct. 676 (2014)). The court observed that petitioner's sentence of 77 months of imprisonment was at the bottom of the advisory Guidelines range that the district court applied and in the middle of the correct Guidelines range. Ibid. Because petitioner's sentence fell within both Guidelines ranges, the court explained that petitioner was obligated "to point to 'additional evidence' in the record, other than the difference in ranges, to show an effect on his substantial rights." Ibid. (quoting United States v. Pratt, 728 F.3d 463, 481-482 (5th Cir.

2013), cert. denied, 134 S. Ct. 1328 (2014)). Because petitioner had not done so, the court concluded that he had not established plain error warranting reversal. Ibid. The court also rejected in a footnote petitioner's alternative argument -- which he had recognized was foreclosed by circuit precedent -- that any error in calculating the Guidelines range presumptively affects a defendant's substantial rights. Id. at 21 n.1.

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals misapplied the plain-error rule by declining to find that the district court's application of the incorrect Guidelines range presumptively affected his substantial rights.[1] The court of appeals' unpublished decision is correct. And although the court's approach to plain-error review is in some tension with decisions of two other courts of appeals, this Court's review is unwarranted at this time, both because the courts of appeals are entitled to take different approaches to reviewing forfeited Guidelines miscalculation claims and because no square conflict exists in cases (such as this one) where the defendant's sentence falls within both the correct and incorrect advisory Guidelines ranges.

---

[1] A similar question is presented in De La Torre-De La Torre v. United States, petition for cert. pending, No. 14-9138 (filed Mar. 30, 2015), and Garcia v. United States, petition for cert. pending, No. 14-9154 (filed Mar. 30, 2015).

This Court has previously denied review in several cases raising the question presented, and the same result is appropriate here.[2]

1. The district court applied an advisory Guidelines range of 77 to 96 months of imprisonment and decided to impose a sentence within that range. C.A. ROA 115; PSR ¶ 74. As the court of appeals explained, the correct range was 70 to 87 months of imprisonment, and petitioner's sentence was within that range. Pet. App. 20. The court of appeals correctly concluded that petitioner did not establish any effect on his substantial rights because he failed to demonstrate a reasonable probability that he would obtain a different sentence if he were resentenced using the correct Guidelines range.

a. To obtain relief on a forfeited claim, petitioner must meet the plain-error standard. Fed. R. Crim. P. 52(b). To show reversible plain error, petitioner must demonstrate: (1) that the district court committed an error; (2) that the error was "plain," "clear," or "obvious"; (3) that the error "affect[ed] [his] substantial rights"; and (4) that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993)

---

[2] See Sanchez-Brenez v. United States, 132 S. Ct. 1096 (2012) (No. 11-6942); Hudson v. United States, 132 S. Ct. 575 (2011) (No. 11-5325); Pacheco-Garcia v. United States, 132 S. Ct. 451 (2011) (No. 10-9445); Guerrero-Campos v. United States, 132 S. Ct. 451 (2011) (No. 10-9746); Wesevich v. United States, 132 S. Ct. 451 (2011) (No. 10-10340).

(citation omitted). This Court has explained that, "in most cases," the requirement of an effect on substantial rights "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." Id. at 734. Under the plain-error standard of Rule 52(b), unlike the harmless-error standard of Rule 52(a), "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Ibid. The defendant's burden on plain-error review is to show a reasonable probability that, absent the error, the result of the proceeding would have been different. See, e.g., United States v. Dominguez Benitez, 542 U.S. 74, 81-82 (2004) (adopting the same standard for plain-error cases as for other "cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief," which "requir[es] the showing of 'a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.'" (citation omitted; second set of brackets in original)).

Applying the third prong of plain-error review in this case, the court of appeals correctly held that petitioner had not met his burden of showing that an advisory Guidelines range of 70 to 87 months of imprisonment, rather than a Guidelines range of 77 to 96 months, affected his substantial rights. Pet. App. 21. While the advisory Guidelines range forms the "starting point and the initial benchmark, district [judges] may impose sentences within statutory

limits based on appropriate consideration of all of the factors listed in [18 U.S.C.] 3553(a)." Pepper v. United States, 562 U.S. 476, 490 (2011) (citation omitted). It would be one thing to presume that a reasonable probability exists that a judge might have imposed a different sentence if the judge imposed a within-range sentence, but the correct range does not overlap with the incorrect range that the judge actually applied. In that circumstance, the sentence actually imposed would reflect a departure (or variance) from the correct range when the court had not necessarily disagreed with the Guidelines' advice.[3] Cf. 18 U.S.C. 3553(c)(2) (requiring the court to give a "specific reason" for a non-Guidelines sentence). But it is quite different when the judge has already selected a sentence within the correct range. Under those circumstances, even if the court commits a Guidelines error, the court's sentence accords with the Sentencing Commission's advice because of the overlap between the correct and incorrect ranges. Indeed, the Commission originally designed the Sentencing Table with overlapping ranges in order to "discourage unnecessary litigation." Sentencing Guidelines Ch. 1, Pt. A, intro. cmt. 1, § 4(h), at 11 (2014). "Both prosecution and defense will realize that the difference between one level and another will

---

[3] Even then, on plain-error review, reversal is not automatic. See, e.g., United States v. Dickson, 632 F.3d 186, 191 (5th Cir.), cert. denied, 131 S. Ct. 2947 (2011); United States v. Davis, 602 F.3d 643, 649-650 (5th Cir. 2010).

not necessarily make a difference in the sentence that the court imposes." Ibid. That point has added force in an advisory Guidelines regime.

As the court of appeals noted, petitioner's sentence of 77 months fell within both the Guidelines range employed by the district court and the Guidelines range that should have been used absent the incorrect scoring of his criminal history. Pet. App. 21. Petitioner has pointed to nothing in the record suggesting that the lower overlapping range would have changed the ultimate sentence. The court of appeals properly looked to all the facts of this case, not just the error in computing the Guidelines range, and correctly concluded that petitioner had failed to carry his burden of demonstrating "a reasonable probability" that, but for the error in the computation of his advisory Guidelines range, "he "would have received a lesser sentence." Ibid. (citation omitted).[4]

---

[4] The court of appeals has concluded in other cases that a sentence at the low end of the advisory Guidelines range may be persuasive, but not dispositive, evidence of a reasonable probability that the district court would have imposed a different sentence had it used a different Guidelines range. See, e.g., United States v. Rodriguez-Gutierrez, 428 F.3d 201, 205 (5th Cir. 2005) ("[S]entences falling at the absolute minimum of the Guidelines provide the strongest support for the argument that the judge would have imposed a lesser sentence. Although we do not hold that this fact alone will establish that the * * * error affected the defendant's substantial rights, we do consider it to be highly probative."), cert. denied, 546 U.S. 1193 (2006); id. at 205-206 ("To clarify, we do not * * * suggest that every sentence imposed at the absolute minimum of the range provided by the

b. Contrary to petitioner's suggestion (Pet. 10, 17), this Court's precedents do not support a presumption that every error in calculating the advisory Guidelines range affects substantial rights. Petitioner relies primarily on Olano, supra, where the Court stated that it "need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial,'" or whether there are some "errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." 507 U.S. at 735.[5] The Court in Olano, however, declined to presume an effect on substantial rights from the error there -- the presence of alternate jurors in the jury room during deliberations, in violation of Fed. R. Crim. P. 24(c). 507 U.S. at 737. And the Court has not recognized any errors that qualify for such a presumption since Olano.

Guidelines will necessarily compel reversal by this Court."). Even if the court of appeals should have given the bottom-of-Guidelines range sentence here significance as a matter of circuit law -- a fact-bound question that does not warrant further review -- its failure to do so in this unpublished disposition has no effect on circuit precedent.

[5] The Court has also reserved the question, in Olano and subsequent cases, of whether "certain errors, termed 'structural errors,' might 'affec[t] substantial rights' regardless of their actual impact on an appellant's trial." United States v. Marcus, 560 U.S. 258, 263 (2010) (citation omitted); see Puckett v. United States, 556 U.S. 129, 140-141 (2009); Johnson v. United States, 520 U.S. 461, 468-469 (1997); Olano, 507 U.S. at 735. Petitioner does not contend that a Guidelines miscalculation qualifies as structural error.

To the contrary, the Court has repeatedly rejected claims that particular "kind[s] of error[s] would automatically 'affect substantial rights' without a showing of individual prejudice." United States v. Marcus, 560 U.S. 258, 264-265 (2010). The Court in Marcus, for example, rejected a court of appeals rule under which appellants were entitled to relief if there was "'any possibility'" that they had been convicted based on conduct that had not yet been made criminal at the time of their actions. Id. at 263-266 (quoting United States v. Marcus, 538 F.3d 97, 102 (2d Cir. 2008), rev'd, 560 U.S. 258 (2010)); see also United States v. Davila, 133 S. Ct. 2139, 2149 (2013) (rejecting rule of automatic vacatur for violation of Federal Rule of Criminal Procedure barring judicial participation in plea discussions). And in Puckett v United States, 556 U.S. 129 (2009), the Court held that a case-specific showing of prejudice is required for forfeited claims that the government breached a plea agreement, even though that error would trigger automatic reversal on appeal had it been timely raised. Id. at 139-143. The Court explained that it is no more difficult to assess the effect of "plea breaches at sentencing than" to assess the effect of "other procedural errors at sentencing, which are routinely subject to harmlessness review." Id. at 141. The Guidelines-calculation error at issue here is likewise a "procedural error[] at sentencing," ibid., that is

subject to harmless-error analysis. See Williams v. United States, 503 U.S. 193, 203 (1992).

The Court's decision in Peugh v. United States, 133 S. Ct. 2072 (2013) (cited at Pet. 14, 16), also does not support a presumption of prejudice for all Guidelines errors. The Court in Peugh held that the Ex Post Facto Clause is violated when a defendant is sentenced under later-promulgated Sentencing Guidelines that provide for a higher advisory sentencing range than the Guidelines in effect at the time of the offense. Id. at 2079. But the Court recognized that the constitutional sentencing error that it identified was subject to harmless-error analysis and that such errors "may be harmless" when the record makes clear that the sentencing court "would have imposed the same sentence under the older, more lenient Guidelines." Id. at 2088 n.8. That analysis equally supports a case-specific prejudice inquiry when the defendant bears the burden of showing an effect on substantial rights, rather than the government the burden of disproving one.

2. Petitioner claims (Pet. 11-15) that the court of appeals' approach to plain-error review conflicts with decisions of the Third and Tenth Circuits, but petitioner overstates the importance and degree of any conflict.

a. As an initial matter, to the extent that the courts of appeals conduct plain-error analysis differently in cases involving alleged Guidelines errors, this Court has not insisted on rigid

procedural uniformity in appellate review of sentences following its decision rendering the Guidelines advisory in United States v. Booker, 543 U.S. 220 (2005). See Rita v. United States, 551 U.S. 338, 354 (2007) (permitting, but not requiring, courts of appeals to apply "a presumption of reasonableness" to a within-Guidelines-range sentence); cf. Rodriguez v. United States, 545 U.S. 1127 (2005) (No. 04-1148) (denying a writ of certiorari despite the government's suggestion that the Court grant review to resolve a circuit conflict over the proper application of the plain-error standard to forfeited claims of sentencing error under Booker). This Court has not held that any error in calculating a defendant's Guidelines range presumptively affects the defendant's substantial rights for purposes of plain-error review, and the courts of appeals are entitled to take different approaches in dealing with that question.

b. In any event, the approach taken by the decision below does not directly conflict with any decision of another court of appeals. Although two courts of appeals have made statements, in distinguishable contexts, that are in tension with the Fifth Circuit's approach, no square circuit conflict exists at this time, and no further review is warranted.

i. One of the two cases on which petitioner primarily relies (Pet. 12-14), United States v. Knight, 266 F.3d 203 (3d Cir. 2001), was decided while the Guidelines were still mandatory, before this

Court's decision in Booker, supra. That decision did hold that a Guidelines error presumptively affects substantial rights even when the ranges overlap, "unless the record shows that the sentence was unaffected by the error." Knight, 266 F.3d at 207-208; see also United States v. Syme, 276 F.3d 131, 158 (3d Cir.) (cited at Pet. 13) (repeating the statement from Knight that "an error in application of the Guidelines that results in use of a higher sentencing range should be presumed to affect the defendant's substantial rights"), cert. denied, 537 U.S. 1050 (2002). But the question whether a district court would have imposed the same sentence even under a different Guidelines range is quite different now that the Guidelines are advisory. Under advisory Guidelines, the district court has discretion to impose any sentence between the statutory minimum and maximum, not just a sentence within the incorrectly calculated advisory Guidelines range. In deciding on the appropriate sentence, the court takes all of the relevant factors into account, without any presumption in favor of a Guidelines sentence. Gall v. United States, 552 U.S. 38, 50 (2007). That discretion reduces the likelihood that an error in the range has affected the outcome when the sentence imposed lies within the correct range.

Here, for example, the correct Guidelines range was 70 to 87 months; the district court considered sentences within that range because they overlapped with the incorrect range (77 to 96 months).

Nothing about that decision indicates a reasonable likelihood that the court would have selected a different sentence if the court had been aware that the correct advisory Guidelines range included the sentence imposed but also extended seven months lower.

The Third Circuit has not squarely reached the question presented in any post-Booker case governed by the plain-error standard. In a published decision not cited by petitioner, the Third Circuit did state that it adhered to its pre-Booker precedent on prejudice from Guidelines errors, even in advisory Guidelines cases. United States v. Langford, 516 F.3d 205, 216-218 (2008). But Langford was a harmless-error case in which the government, not the defendant, bore the burden of proof. Because there was "nothing in the record to indicate that the District Court would have imposed the same sentence under a lower Guidelines range," and the sentence was "at the low end[point] of the erroneous Guidelines range" actually used, the court held that the government had not carried its burden of showing harmlessness. Id. at 219 & n.5; see id. at 208. The court acknowledged, however, that in examining whether the Guidelines error affected the sentence actually imposed, "[t]he overlap [between the correct and incorrect Guidelines ranges] may be helpful," although "it is the sentencing judge's reasoning, not the overlap alone, that will be determinative." Id. at 216.

Petitioner cites (Pet. 14) an unpublished decision in which the Third Circuit similarly stated that the presumption described in Knight "applies even in the post-Booker context." United States v. Porter, 413 Fed. Appx. 526, 530 (2011).[6] But Porter did not involve a sentence that fell within the defendant's correct advisory Guidelines range. Rather, the defendant's 35-month sentence in that case was above his correct advisory Guidelines range of 27 to 33 months but within the 33 to 41 month range used by the district court. See id. at 529-531. And in deciding to remand, the court of appeals addressed only the government's argument that the defendant could not show an effect on substantial rights because the vacated two-level enhancement was offset by another two-level enhancement that the district court could also have applied. Id. at 530. The court of appeals acknowledged that possibility, and it remanded for the district court to make the necessary findings in the first instance. Id. at 531.

Accordingly, although these two decisions suggest that the Third Circuit might disagree with the Fifth Circuit's application of the substantial-rights prong in this case, the Third Circuit has

---

[6] Both Porter and Langford cite United States v. Wood, 486 F.3d 781, 790-791 (3d Cir.), cert. denied, 552 U.S. 855 (2007), a plain-error case that postdated Booker. The Guidelines error there was based on the Ex Post Facto Clause, and it resulted in a three-level enhancement; as a result, the correct and incorrect Guidelines ranges did not overlap. The government conceded that the error affected substantial rights, and the court of appeals did not discuss the issue. Id. at 790.

not squarely addressed that question in a plain-error case like this one, in which the defendant's sentence falls within both the correct and incorrect advisory Guidelines ranges.

ii. For similar reasons, the Tenth Circuit's recent decision in United States v. Sabillon-Umana, 772 F.3d 1328 (2014) (cited at Pet. 14-15), does not create a circuit conflict that warrants review. As relevant here, the court in Sabillon-Umana concluded that the district court had "obviously erred in construing its authority" to depart from the otherwise applicable advisory Guidelines range based on the defendant's substantial assistance to the government, because it believed itself bound by the government's assessment of the degree of sentencing departure warranted by that assistance. Id. at 1334-1335; see Sentencing Guidelines § 5K1.1. Applying plain-error review, the Tenth Circuit construed its pre- and post-Booker decisions to have "recognized that an obvious misapplication of the sentencing guidelines will usually satisfy the third and fourth elements of the plain error test." 772 F.3d at 1333. The court stated that other circuits had "reached similar conclusions or even adopted an explicit presumption that a clear guidelines error will satisfy the latter two steps of plain error review." Ibid.[7] The court then opined

---

[7] In support of this statement, the Tenth Circuit cited the Third Circuit's decision in Knight, as well as United States v. Vargem, 747 F.3d 724, 728-729 (9th Cir. 2014); United States v. Wernick, 691 F.3d 108, 117-118 (2d Cir. 2012); United States v. Slade, 631 F.3d 185, 191-192 (4th Cir.), cert. denied, 131 S. Ct.

that "[t]his presumption is sound," reasoning that a Guidelines calculation error "'runs the risk of affecting the ultimate sentence regardless of whether the court ultimately imposes a sentence within or outside [the] range' the guidelines suggest." Ibid. (brackets in original) (quoting United States v. Rosales-Miranda, 755 F.3d 1253, 1259 (10th Cir. 2014)). The court therefore concluded that "[a] presumption that the third and fourth prongs are met by obvious guidelines errors is * * * sensible and consistent with the terms of those tests, our case law, and the law of other circuits." Id. at 1334.

In so concluding, the Tenth Circuit recognized that "presumptions can be overcome and the presumption that obvious guidelines errors meet the latter elements of the plain error test can be too." Sabillon-Umana, 772 F.3d at 1334. But the court found no record evidence in that case, such as a "'fortuitous comment' from the sentencing judge," indicating that the judge's misunderstanding of his departure authority posed no risk of a higher sentence. Id. at 1334-1335 (quoting Knight, 266 F.3d at 207). On the contrary, the court stressed that the judge had initially expressed interest in imposing a sentence as low as 72

2943 (2011); United States v. Story, 503 F.3d 436, 440-441 (6th Cir. 2007); and United States v. Baretz, 411 F.3d 867, 877 & n.7 (7th Cir. 2005). Petitioner does not contend that the latter decisions conflict with the decision of the court of appeals in this case, and with good reason: none of them adopted a presumption of prejudice for all Guidelines errors.

months and had settled on a sentence two years longer "only after the government said that was the lowest guidelines-based sentence the court could accept consistent with its (mistaken) view of § 5K1.1." Id. at 1335.

The presumption adopted in Sabillon-Umana suggests that the Tenth Circuit would disagree with the court of appeals' requirement in this case that petitioner make an individual showing of prejudice at the third step of the plain-error analysis. But like the Third Circuit decisions discussed above, Sabillon-Umana itself did not involve overlapping Guidelines ranges.[8] The Tenth Circuit has thus had no occasion to address how its presumption would apply in a case like petitioner's, where the sentence imposed falls within both the correct advisory Guidelines range and the incorrect range used by the district court. And because the court of appeals made clear that its presumption is rebuttable, it would be premature to conclude that the two circuits' approaches will

---

[8] In a decision quoted in Sabillon-Umana, 772 F.3d at 1333, the Tenth Circuit cited with approval a pre-Booker decision holding that a sentencing error satisfied the third prong of the plain-error test even though the defendant's sentence fell within the correct Guidelines range. See Rosales-Miranda, 755 F.3d at 1261 (discussing United States v. Osuna, 189 F.3d 1289 (10th Cir. 1999)). But Rosales-Miranda itself did not involve overlapping ranges; the error there "more than doubled" the advisory Guidelines range. Id. at 1260. And the court discussed its earlier decisions in the course of rejecting an argument that defendants "should be deemed as a matter of law not to have been prejudiced" when their sentence falls within the correct advisory range. Id. at 1261.

necessarily lead to different results in overlapping-range cases such as this one. Accordingly, even if this Court's precedents required a uniform approach to plain-error review of Guidelines misapplication claims, see pp. 14-15, supra, the Court's intervention would be premature at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

JENNY C. ELLICKSON
Attorney

JUNE 2015